2010

Tavis McArthur v. State Farm Mutual Automobile Insurance Company : Brief of Appellant

Utah Court of Appeals

Stuart H. Schultz; Strong & Hanni; attorney for appellee.
A. Bryce Dixon; attorney for appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Tavis McArthur,

Plaintiff and Appellant,

v. **Case No. 20100847-SC**

State Farm Mutual Automobile Insurance Company

Defendant and Appellee.

BRIEF OF APPELLANT

Regarding Certified Questions from the United States Court of Appeals For the Tenth Circuit Case No. 09-4239

ORAL ARGUMENT REQUESTED

Stuart H. Schultz
Strong & Hanni
3 Triad Center, Ste 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Attorney for Appellee

A. Bryce Dixon
20 N. Main Street, Suite 20
St. George, UT 84770
Telephone: 435-652-8000
Attorney for
Tavis McArthur, Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Tavis McArthur,

Plaintiff and Appellant,

v.

Case No. 20100847-SC

State Farm Mutual Automobile Insurance Company

Defendant and Appellee.

BRIEF OF APPELLANT

Regarding Certified Questions from the United States Court of Appeals
For the Tenth Circuit
Case No. 09-4239

ORAL ARGUMENT REQUESTED

Stuart H. Schultz
Strong & Hanni
3 Triad Center, Ste 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Attorney for Appellee

A. Bryce Dixon
20 N. Main Street, Suite 205
St. George, UT 84770
Telephone: 435-652-8000
Attorney for
Tavis McArthur, Appellant

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

II. JURISDICTIONAL STATEMENT

A. Plaintiffs filed this action in the United States District Court for the District of Utah, on the basis of Diversity of Citizenship pursuant to 28 U.S.C. §1332, Mr. McArthur being a resident of Utah and State Farm Mutual Automobile Insurance Company (State Farm) not. Mr. McArthur suffered personal injuries and medical and hospital expenses such that this case has an amount in controversy exceeding $75,000.00 exclusive of interest and costs and exceeding the sum specified by 28 U.S.C. §1332(a).

B. The trial court's decision to grant summary judgment to State Farm and deny Mr. McArthur's motion for summary judgment resulted in a final judgment in favor of State Farm. Under 28 U.S.C.A. §1291 and F.R.A.P 3 and 4 this judgment was appealed to the Tenth Circuit Court of Appeals which accepted jurisdiction.

C. The trial court's memorandum and decision was entered on December 9, 2009. Mr. McArthur filed his notice of appeal on

December 29, 2009 within the time limits set by F.R.A.P. 4(a)(1)(A).

D. This is an appeal from a final judgment that disposes of all parties' claims.

E. The Tenth Circuit Court of Appeals on October 21, 2010 ordered state law questions, determinative of the outcome, to be certified to the Supreme Court of Utah.

F. The Supreme Court of Utah accepted the certification by order filed December 9, 2010.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the Utah Supreme Court should adopt the majority view in holding that an exhaustion clause in an insurance policy providing coverage for Underinsured Motorist Claims (UIM) is unenforceable, thus preventing insureds like Tavis McArthur from being hung on the horns of this dilemma: if Mr. McArthur accepted the final settlement offered by the liability carrier with a 10% discount from policy limits as the price of settlement, then he would waive his UIM coverage of $100,000 but, if he sued to collect 100% of the liability coverage, as State

Farm (the UIM carrier) insisted, he would be required to spend years of time and attorney's fees to collect a mere $10,000 which, in his injury-induced impoverishment, he could not afford to do.

B. If the exhaustion clause of the UIM policy is not generally unenforceable, whether the enforceability of such exhaustion clause is contingent upon the insurer establishing actual prejudice to its economic interest.

C. These are the issues presented as likely dispositive in the proceedings before the Tenth Circuit Court of Appeals, no Utah law appearing to control the answers to the certified questions, restated here as issues.

IV. CITATION TO RECORD SHOWING PRESERVATION OF RECORD ON APPEAL

A. No such citation is necessary inasmuch as the Tenth Circuit has certified these questions as determinative of disposition in that court, which certification presumes that the Tenth Circuit has already concluded that the issues are preserved on appeal.

V. STATUTE WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Code Annotated (UCA) section 31A-22-305.3, subsection (5) provides:

5)(a) Within five business days after notification in a manner specified by the department that all liability insurers have tendered their liability policy limits, the underinsured carrier shall either:

(i) waive any subrogation claim the underinsured carrier may have against the person liable for the injuries caused in the accident; or

(ii) pay the insured an amount equal to the policy limits tendered by the liability carrier.

VI. STATEMENT OF THE CASE

A. Nature of the Case:

Tavis McArthur sued State Farm Mutual Automobile Insurance Company (State Farm) alleging that it had violated its insurance contract by refusing to consider Mr. McArthur's claim for UIM benefits from which he desired to satisfy the balance of his $200,000 in personal injury damages. State Farm alleged that it had no obligation to consider the claim for $100,000 in UIM benefits because Mr. McArthur had only recovered

$90,000 of the $100,000 policy limits of the negligent motorist while the UIM policy requires exhaustion of liability policy limits as a condition to recovery of UIM benefits. The trial court ruled on cross motions for summary judgment that the exhaustion clause was enforceable as written and did not violate Utah public policy, granting State Farm's summary judgment and denying Plaintiff's.

B. Statement Of The Facts

Mr. McArthur's complaint alleged the following facts: On August 5, 2007, Mr. McArthur was driving his motorcycle on River Road in St. George, Utah. As a result of a car crash, Mr. McArthur was thrown from his motorcycle. Mr. McArthur underwent open reduction and internal fixation of the 4th and 5th tarsometatarsal joints and open reduction and internal fixation of the 4th and 5th metatarsophalangeal joints in the left foot. Mr. McArthur's recovery was delayed by several complications, causing him to seek treatment for pain management. He continues to suffer pain relentlessly, a condition known as reflex dystrophy syndrome, sometimes called complex regional pain syndrome. He received a whole body disability rating of 19%. Mr. McArthur's contended below that his damages exceeded $200,000. However, Mr. McArthur alleged that he felt compelled to accept the $90,000

final settlement offer from the liability carrier's $100,000 policy limits because he, not having worked since the accident, could not survive without immediate funds. His only alternative was to file a lawsuit against the negligent motorist. However, the cost in time and money for such a suit would have been much greater than the additional $10,000 insurance he was entitled to recover for his injuries against the liability carrier of the negligent motorist.

Mr. McArthur then asserted a claim to collect the $100,000 UIM limits from his own motorist insurance policy. But State Farm refused to consider the claim, invoking the exhaustion clause in the UIM policy, which makes recovery of UIM benefits conditional upon exhausting all policy limits of all possible liability policies. This, the pertinent language of the exhaustion clause at issue, is not at issue:

THERE IS NO COVERAGE UNTIL: 1. THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OR JUDGMENTS OR SETTLEMENTS TO OTHER PERSONS . . . .

Cross motions for summary judgment were filed. The trial court decided that the facts that Plaintiff had alleged as context for deciding to

accept the $90,000 settlement were irrelevant to his decision, ruling that regardless of those facts, one fact was determinative: that Mr. McArthur's acceptance of the final $90,000 settlement offer from the liability carrier precluded him from making a claim for the difference between the liability policy limits of $100,000 and the UIM limits of $100,000. [1]

VII. SUMMARY OF THE ARGUMENT

State Farm denied Mr. McArthur, already suffering intolerable burdens because of his injuries and disability, his $100,000 in UIM benefits. State Farm invoked a harsh and penal exhaustion clause, a provision of Mr. McArthur's insurance policy which has no economic justification for State Farm, except for the advantage gained by denying otherwise earned benefits. The many jurisdictions that have rejected the exhaustion clause have held that the UIM carrier is given credit for the full policy limits, thus satisfying every legitimate financial interest of the UIM carrier. The UIM carrier never loses any money if there is a credit granted because the UIM carrier only pays out the difference between the liability policy limits and the UIM obligation.

---

[1] The facts stated herein were supported by the record and not disputed in the Tenth Circuit.

Of courts deciding the issue, 23 of 30 hold the UIM exhaustion clause void as against public policy. Neighboring states considering the issue (Arizona, Colorado, Montana, Nevada, Washington, Oregon, and Hawaii) have expressly ruled in accordance the majority opinion, rejecting the exhaustion clause. Nearly every court that has **not** so held bases its decision on **statutory language** that requires exhaustion, the prominent examples being California and Alaska.

Utah's UIM statutes do not require exhaustion of policy limits as do California's and Alaska's. The Utah UIM statutes expressly define a UIM situation without reference to policy limits. However, Utah's UIM statutes make a single reference to "policy limits" but only within the context of subrogation rights, rights that are practically impossible for a UIM carrier to exercise effectively. This subrogation right is intended to benefit the UIM claimant by preventing the UIM carrier from denying claims on the grounds that the injured person's release precluded the UIM carrier's right of subrogation.

Most jurisdictions have statutory references to "policy limits," yet they still hold that public policy invalidates the exhaustion clause.

Utah public policy, expressed in references both to the beneficial nature of UIM coverage and to settlement of litigation, demands vitiation of the exhaustion clause.

State Farm Mut. Auto. Ins. Co. v. Green, 2003 UT 48, 89 P.3d 97 (Sup. Ct. 2003) indicates that Utah should adopt the majority rule because it follows the majority rule on the issue of the consent-to-settle clause which was an early battle ground fought by the insurance industry to attempt to avoid UIM claims. The majority rule ameliorated the harsh effects of the consent-to-settle clause by holding that the insured could proceed with the UIM claim even without obtaining consent unless the insurance company could prove that it could have collected a subrogation judgment against the personal assets of the tortfeasor. This majority that *Green* followed regarding consent-to-settle uses similar reasoning as that of the majority that strikes down the exhaustion clause as a technicality. Montana, in *Sorensen v. Farmers Ins. Exch.* 279 Mont. 291, 927 P.2d 1002 (Mont. 1996), first decided in favor of the insured on a consent-to-settle case and the next year then went on to decide in favor of the insured in an exhaustion clause case, using the reasoning from the consent-to-settle case to support its reasoning for the exhaustion clause case. *Augustine v. Simonson*, 283 Mont. 259, 940

P.2d 116 (1997). Since Utah uses the same reasoning in its consent-to-settle case, it should follow the same path that Montana took in striking down the exhaustion clause.

Mr. McArthur will show that Utah's UIM statutes are similar to the statutes of the states that have adopted the majority rule. In fact, Utah's statutes are more favorable to striking down the exhaustion clause than the typical statutory scheme of the majority rule. Most of the Western states that have adopted the majority rule do so in the face of statutes that define UIM coverage in terms of "limits of liability." The cases cited by State Farm are not persuasive regarding the Utah statutory scheme.

VIII. ARGUMENT

A. THE EXHAUSTION CLAUSE IS A HARSH, TECHNICAL PENALTY THAT VIOLATES THE INTERESTS OF THE INSURED.

As in the instant case, the UIM insurance contract typically includes a provision that all applicable liability insurance policies must be exhausted before the UIM carrier is obligated to consider a UIM claim. Nearly all the courts who have considered the validity of the exhaustion clause, absent statutory language compelling exhaustion, have condemned the exhaustion clause as technical, penal and contrary to the beneficial policies that UIM statutes seek to promote. For example, in *Mann v. Farmers Insurance*

Exchange, 108 Nev. 648, 836 P.2d 620 (1992) the Supreme Court of Nevada, invalidating the exhaustion clause, observed:

> The damaged insured is placed in a difficult situation if he or she must forego all settlement offers and go to trial in order to obtain (or attempt to obtain) compensation up to the tortfeasor's policy limit -- just to qualify for underinsured benefits under his or her own policy. For instance, if an insured covered by a policy like Mann's were involved in an accident with three other drivers, each of whom was responsible for the accident to a different extent, the insured would have to exhaust the liability limits of *each* tortfeasor's policy before pursuing underinsured motorist benefits. Thus, in this example, even if one of the drivers was only ten percent at fault, the insured could not settle with this driver for less than his or her policy limit without giving up underinsured motorist benefits.
>
> Additionally, if a tortfeasor offers the insured, in good faith, an amount less than the tortfeasor's policy limit, and the insured has suffered injuries exceeding the tortfeasor's policy limit, the insured cannot accept this offer, even if it is close to the tortfeasor's policy limit, unless the insured is willing to forego underinsured motorist benefits. Instead, the insured is forced to go to trial, and costs are added while payment is delayed.

While the Nevada Supreme Court was not faced with the actual situation of multiple negligent parties[2] it used that hypothetical to underscore the injustice of the technical application of the exhaustion clause. To cut down on its payout, every liability carrier wishes to impute even a small degree of fault to a third party, perhaps only tenuously related to the accident. If that party has even moderately sized insurance limits, exhaustion will be

---

[2] *Mann, supra,* involved one negligent party. P. 620

impossible, giving pretext for avoidance of the UIM claim. The exhaustion clause State Farm included in Mr. McArthur's policy, if enforced according to its terms, would likewise require the exhaustion of the liability policy of a comparatively negligent party whose negligence contributed only a small portion of the total fault causative of the accident. For example, a negligent party's policy may have limits of $300,000 but his or her percentage of the total fault is only 10%, thus making impossible the exhaustion of policy limits. This technical application would certainly result in an unjust denial of UIM benefits.

The Montana Supreme Court in *Augustine v. Simonson*, 940 P. 2d 116, 119 (Mont Sup. Ct. 1997) voided the exhaustion clause as a "technicality," reasoning from a prior decision in this language:

> [W]e held that there was no prejudice to the insurer where the tort-feasor was judgment proof and, consequently, the insured's actions would not compromise the insurer's ability to subrogate. We explained the meaning of this no prejudice rule as "absent some showing of material prejudice to the underinsurance carrier, a claim for underinsured motorist coverage may not be precluded on a **technicality**." *Soren*sen, 927 P.2d at 1004 (Emphasis added.)

The Montana Supreme Court, quoting language from the Ohio Supreme Court[3], further reasoned:

> Where the amount of settlement is less than the policy limits, the unpaid amount may well represent the savings in litigation costs for both sides. More importantly, settlement hastens the payment to the injured party who obviously needs compensation soon after the injuries when the medical expenses begin to amass and when the anxiety level is probably quite high.

Id. at 119, 120

This applies directly to the instant case. Mr. McArthur contended below that he accepted a $10,000 discount from $100,000 in liability policy limits because he could not afford to litigate over that small amount. His medical bills and lost wages "amassing," his physical and financial health in shambles, his anxiety rising, Mr. McArthur simply could not be reasonably required to litigate for two or three years, spending over a $100,000 in fees and costs, to recover a mere $10,000.

Utah public policy, as shown below, is offended by this kind of litigation gamesmanship. Moreover, Utah decisional law has held that UIM benefits are not to be denied by "a merely technical" application of UIM policy language intended to preserve subrogation rights. See *State Farm Mut. Auto.*

---

[3] *Bogan v. Progressive Cas. Ins. Co.* (Ohio 1988), 36 Ohio St. 3d 22, 521 N.E.2d 447, 451, *modified in part on other grounds, McDonald v. Republic-Franklin Ins. Co.* (Ohio 1989), 45 Ohio St. 3d 27, 543 N.E.2d 456.

Ins. Co. v. Green, 2003 UT 48, 89 P.3d 97, 104 (Sup. Ct. 2003) discussed in argument section "D" below at page 22.

B. THE MAJORITY OF U.S. JURISDICTIONS REJECT THE EXHAUSTION CLAUSE.

The majority of judicial decisions hold the exhaustion clause void[4]. This majority includes decisions from the states neighboring Utah--Arizona, Nevada, Colorado, Montana, Oregon, and Washington[5].

---

[4]*Cobb v. Benjamin*, 325 S.C. 573, 588-589 (S.C. Ct. App. 1997); *Horace Mann Ins. Co. v. Adkins, 215 W. Va. 297, 306 (W. Va. 2004)*; *Omni Ins. Co. v. Foreman*, 802 So. 2d 195 (Ala. 2001); *Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 7 P.3d 973 (2000); *State Farm Mut. Auto. Ins. Co. v. Bencomo*, 873 P.2d 47, (Colo. Ct. App. 1994); *New Hampshire Ins. Co. v. Knight*, 506 So. 2d 75 (Fla. 1987); *Taylor v. Government Employees Ins. Co.,* 90 Hawaii 302, 978 P.2d 740 (1999); *In re Rucker,* 442 N.W.2d 113 (Iowa 1989); *Brown v. USAA Casualty Ins. Co., 17 Kan. App. 2d 547 (Kan. Ct. App. 1992*); *Metcalf v. State Farm Mut. Auto. Ins. Co.,* 944 S.W.2d 151, 44 6 Ky. L. Summary 6 (Ky. Ct. App. 1997); *Aetna Cas. & Sur. Co. v. Faris*, 27 Mass. App. Ct. 194, 536 N.E.2d 1097 (1989); *Linebaugh v. Farm Bur. Mut. Ins. Co.*, 224 Mich. App. 494, 569 N.W.2d 648 (1997); *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), superseded by statute as stated in *Onasch v. Auto-Owners Ins. Co.*, 444 N.W.2d 587 (Minn. Ct. App. 1989); *Augustine v. Simonson*, 283 Mont. 259, 940 P.2d 116 (1997); *Mann, v. Farmers Insurance Exchange,* Supreme Court of Nevada, 108 Nev. 648; 836 P.2d 620 (1992); *Barrett v. New Jersey Mfrs. Ins. Co.*, 295 N.J. Super. 613, 685 A.2d 975 (1996); *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St. 3d 22, 521 N.E.2d 447 (1988), overruled on other grounds by *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 2002 Ohio 7217, 781 N.E.2d 927 (2002), review denied, 98 Ohio St. 3d 1463, 783 N.E.2d 521 (2003) (unpublished table decision); *Buzzard v. Farmers Ins. Co. Inc.,* 1991 OK 127, 824 P.2d 1105 (Okla. 1991); *Vega v. Farmers Ins. Co. of Oregon*, 323 Or. 291, 918 P.2d 95 (1996), superseded by statute on other grounds as stated in *Hamm v.*

Even the cases cited by Defendant, which rely on statutory language constraining exhaustion, admit that the majority view holds the exhaustion clause void as against public policy. See *Farmers Ins. Exch. v. Hurley*, 76 Cal. App. 4th 797, 802-803 (Cal. App. 4th Dist. 1999); *Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829, 834 (Alaska 2001).

C. UTAH'S UIM STATUTE DOES NOT REQUIRE EXHAUSTION

In cross motions for summary judgment, State Farm relied heavily on these cases from California and Alaska that ruled in favor of exhaustion. However, these cases both relied on statutory language that expressly required exhaustion. California's statutory language is quoted in *Hurley, supra,* at p. 800-801:

> The provision at issue in this case, section 11580.2(p)(3), provides that underinsurance coverage "does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor

---

Allied Mut. Ins. Co., 612 N.W.2d 775 (Iowa 2000); *Sorber v. American Motorists Ins. Co.*, 451 Pa. Super. 507, 680 A.2d 881 (1996); *LeFranc v. Amica Mut. Ins. Co.,* 594 A.2d 382 (R.I. 1991), superseded by statute as stated in *Sunderland v. Allstate Ins. Co.*, 717 A.2d 53 (R.I. 1998); *Cobb v. Benjamin,* 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997); *Leal v. Northwestern Nat'l County Mut. Ins. Co.*, 846 S.W.2d 576 (Tex. Ct. App. 1993); *Hamilton v. Farmers Ins. Co. of Washington,* 107 Wn. 2d 721, 733 P.2d 213 (1987).

[5] Idaho, Wyoming and New Mexico do not have decisions on the exhaustion clause according to Plaintiff's research.

> vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage."

Alaska's statutory language is quoted in *Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829, 832 (Alaska 2001):

> Under AS 28.20.445, UIM coverage *"may not apply* to bodily injury, sickness, disease, or death of an insured or damage to or destruction of property of an insured *until the limits of liability* of all bodily injury and property damage liability bonds and policies that apply *have been used up by payments, judgments or settlements*." (Emphasis in original.)

Utah has no such language in its UIM statutes. Nowhere does Utah's code state that UIM coverage may only be obtained if the policy limits of the tortfeasor are "exhausted" as did California's legislative code or "used up" as did Alaska's. Nowhere does the Utah Code even define UIM coverage in terms of that which exceeds the policy limits of the tortfeasor.

D. UTAH'S SINGLE STATUTORY REFERENCE TO POLICY LIMITS APPLIES ONLY IN THE CONTEXT OF THE SUBROGATION RIGHTS OF THE UIM CARRIER WHICH ARE OF NEGLIGIBLE PRACTICAL VALUE

Although Utah's statute does not require exhaustion, it does make a reference to policy limits, but only in connection with the statutory scheme to preserve the subrogation rights of the UIM carrier in the unlikely event that subrogation is of any value. Utah Code Annotated (UCA) section 31A-22-305.3, subsection (5) provides:

5) (a) Within five business days after notification in a manner specified by the department that all liability insurers have tendered their liability policy limits, the underinsured carrier shall either:

(i) waive any subrogation claim the underinsured carrier may have against the person liable for the injuries caused in the accident; or

(ii) pay the insured an amount equal to the policy limits tendered by the liability carrier.

To explain the significance of this reference to policy limits in the subrogation section of the UIM statutes a little history is necessary. Originally, UIM statutes[6] made no allowance for the right of subrogation against the at-fault party insured by the liability carrier. This right of subrogation by traditional principles of insurance law would seem to vest in the UIM insurance carrier upon paying out a UIM claim. *Schmidt (*pp. 261-263*)* and *Longworth (*pp. 183-185*), supra*, describe the problem that arose when the UIM carrier refused to honor a UIM claim if the claimant had in settlement granted a release to the tortfreasor. Because such a release eliminated the subrogation right, the UIM carrier felt justified in refusing to pay out a UIM claim. Yet the liability carrier would not settle without receiving a release of its at-fault insured. In order to solve this dilemma, Minnesota and New Jersey, in decisions that invalidated the exhaustion

---

[6] For example, those of Minnesota discussed in *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), superseded by statute as stated in *Onasch v. Auto-Owners Ins. Co.*, 444 N.W.2d 587 (Minn. Ct. App. 1989), and *New Jersey, Longworth v. Van Houten* 223 N.J. Super. 174, 538 A.2d 414 (1988)

clause, devised judicially a very similar solution to that which Utah devised statutorily. Courts of these states hold that the subrogation right is preserved when the injured person tenders the right to the UIM carrier to purchase the subrogation right by paying the liability carrier's settlement offer, thus paying the injured person the liability settlement and additionally paying out the UIM claim. *Id.* Thereafter, the negligent motorist is subject to personal liability for the amount that the UIM carrier has paid to its insured on the UIM coverage.

In judicially creating this right of the UIM carrier to pay the liability amount, *Schmidt v. Clothier*, 338 N.W.2d 256, 260,261 (Minn. 1983) holds that there is **no** obligation of the claimant to exhaust the liability limits. Therefore, the preservation of subrogation rights does not necessarily require a tender of policy limits.

While the Utah statute provides a way for the UIM carrier to preserve its subrogation rights, the real purpose of this preservation is to prevent the UIM carrier from doing what it tried to do in Minnesota and New Jersey, that is, avoid paying the UIM claim by confounding an injured person with an unsolvable dilemma. Therefore, Utah's

subrogation statute ought to be construed to benefit the UIM claimant, not as a technical excuse for the UIM carrier to avoid payment.

Moreover, this subrogation right is of nearly no value to the UIM carrier, almost never being actually preserved by following the statutory or judicially created procedure because it has no practical value[7]. The reasons are obvious and undisputed.

First, the UIM carrier would have to pay to its insured both the liability settlement amount and then its UIM coverage as well. Then the UIM carrier would have to sue the negligent motorist to try to recover the sum of those two amounts. The liability carrier would then defend that suit. After years of litigation and likely spending over a $100,000 in attorney's fees and expert witness costs, the UIM carrier would have to go trial to obtain a judgment. The UIM carrier would be required to go to trial because the liability carrier will **not** settle for an amount in excess of its policy limits. Yet that excess amount is the very UIM payout for which the UIM carrier seeks subrogation. Thus, the UIM carrier must incur the expense of paying the liability settlement, then incur the substantial expense of litigation to verdict and if it

---

[7] Mr. McArthur argued this point below without opposition from State Farm. Had discovery been permitted, this would have been one area explored.

then finally gets a judgment against the tortfeasor, it must seek to collect the excess judgment from his or her personal assets, if he or she has not filed bankruptcy or transferred them to an asset protection trust.

In this case, for example, State Farm would be faced with about a $100,000 in attorney's fees and costs of litigation for the right to get a personal judgment against the at-fault driver for $100,000 in excess of liability policy limits[8] which it probably could never collect. Obviously, insurance carriers do not engage in such speculative waste of their resources.

Therefore, the Utah code's reference to policy limits, tied only to the subrogation scheme, in a context entirely unrelated to the substantive operation of the UIM claim, does not constitute an expression of the public policy of Utah on the issue of exhaustion. It certainly is not a sufficiently clear statement to overcome the unjust effects and public policy concerns of the exhaustion clause that other the majority view has convincingly asserted. The context of this reference to "policy limits" implies nothing regarding the validity of the exhaustion clause. There is no evidence that this reference to policy limits is anything more than a convenient way to express what the typical subrogation situation confronting that UIM carrier would look like.

[8] After the judgment the liability carrier would pay its $100,000 in policy limits for a total of $200,000.

That is because the great majority of UIM claims probably follow exhaustion of policy limits even in states where such exhaustion is not required.

If a court must give strict deference to the language, it could be read to require UIM insurance carriers to rely on liability settlement of policy limits only if there is a reasonable basis for making a subrogation claim. It could be construed to mean that if the Plaintiff obtains a policy limits settlement, then it can insist that within five days, the UIM carrier either waive subrogation or pay the policy limits. However, if the injured person desires to take less than policy limits, he or she loses the right to demand the waiver of subrogation within five days. The injured person would have to obtain the consent of the UIM carrier to settle for less than policy limits or the plaintiff could still recover UIM coverage if he or she can show that the UIM carrier could not actually collect a subrogation judgment. Utah law excuses the plaintiff from making the five day demand where the UIM carrier cannot actually collect its subrogation claim. In *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, 89 P.3d 97 (Sup. Ct. 2003) the court ruled that the consent to settle clause as used by a UIM carrier to avoid payment of UIM benefits was ineffective unless the UIM carrier could show that it was prejudiced by the refusal to obtain the right of consent, thus, in effect, requiring the UIM carrier to prove

that it could have actually collected a subrogation judgment. At page 104 the court reasoned:

> We agree with Green and join those courts holding that the breach of consent to settle exclusion is material only if it results in actual, rather than theoretical, impairment of an insurer's ability to recover through subrogation. The purpose of UIM coverage is to provide a source of indemnification for accident victims when the tortfeasor does not have adequate coverage. **Denying coverage to an accident victim on the basis of a merely technical breach that has no effect on the insurer's ability to recover through subrogation does not further that purpose.** (Emphasis added.)

This language has direct applicability to the instant case. This Honorable Court has held that it would not countenance the denial of UIM benefits by operation of a "merely technical breach" such as the acceptance of the $90,000 instead of the $100,000 policy limits because such technical breach did not affect State Farm's ability to recover through subrogation.

E. THE WESTERN STATES WHO HAVE REJECTED THE EXHAUSTION CLAUSE ON PUBLIC POLICY ALL HAVE STATUTORY REFERENCES TO "POLICY LIMITS."

The essence of State Farm's argument boils down to the proposition that Utah statutory law has expressed a public policy in favor of the exhaustion clause because of the mere mention of the phrase, "policy limits," in the UIM statute. This therefore begs an analysis of the statutes of the states that have followed the majority rule in rejecting the exhaustion clause.

Mr. McArthur will first concentrate his efforts on the Western jurisdictions neighboring Utah.

1. Definitional Statutes Analyzed

State Farm first argues that Utah Code Annotated section 31A-22-305.3 (b)(i), which defines an uninsured motor vehicle, requires exhaustion. It provides that an "[u]nderinsured motor vehicle' includes a motor vehicle . . . which has insufficient liability coverage . . . ."

Nevada's counterpart to 31A-22-305.3 (b)(i), found at Nev. Rev. Stat. Ann. § 687B.145, reads as follows:

> Uninsured and underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer which he is legally entitled to recover from the owner or operator of the other vehicle to the extent that those **damages exceed the limits of the coverage for bodily injury carried by that owner or operator.** [Emphasis added.]

The Nevada Supreme Court struck down the exhaustion clause, notwithstanding explicit reference to policy "limits" in its UIM statute. Significantly, the Utah statute defining UIM coverage never refers to policy limits but refers to "insufficient liability coverage." Utah's statue is

therefore, less compelling than Nevada's for the argument that its statutory language demands acceptance of the exhaustion clause.

Arizona's statutory scheme at A.R.S. § 20-259.01 also defines underinsured motorist coverage in terms of liability limits:

> "Underinsured motorist coverage" includes coverage for a person if the sum of the **limits of liability** under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the total damages for bodily injury or death resulting from the accident. To the extent that the total damages exceed the total applicable liability limits, the underinsured motorist coverage provided in subsection B of this section is applicable to the difference.

Addressing the issue of whether this statutory language justified the exhaustion clause, *Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 170 (Ariz. Ct. App. 2000) held:

> The explanation of UIM coverage in A.R.S. § 20-259.01(G) does not provide for exhaustion of a tort-feasor's liability coverage before UIM benefits come into play. Rather, it speaks of the "limits of liability" under "liability bonds and liability insurance policies applicable at the time of the accident. . . ." It provides that UIM coverage is applicable "to the extent that the total damages exceed the total applicable liability limits. . . ." As stated in the statute, entitlement to UIM benefits is based on damages that exceed the applicable liability limits rather than being based on payment or exhaustion of those limits; the statutory language does not require exhaustion of the applicable liability limits as a precondition to payment of UIM benefits. Thus, only language in Country Mutual's policy, not language in the statute, requires exhaustion of the tort-feasor's liability policy before [***11] damages that exceed the liability policy limits will be paid under the UIM coverage.

The Arizona court held that the reference to "limits of liability" only means that the UIM carrier is entitled to constructive exhaustion or a credit for the total liability limits. This constructive exhaustion concept is discussed in more detail below at section F.

Washington also ruled with the majority in *Hamilton v. Farmers Ins. Co. of Washington,* 107 Wn. 2d 721, 733 P.2d 213 (1987) that the exhaustion clause was void as against public policy, although its statute uses "limits of liability" in defining an underinsured motorist:

> RCW 48.22.030(2) provides in part: An
>
> "[u]nderinsured motor vehicle" is defined as a vehicle with insufficient insurance to compensate the plaintiff's damages:
>
> "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the *sum of the limits of liability under all* bodily injury or property damage liability bonds and *insurance policies* applicable to a covered person after an accident *is less than the applicable damages which the covered person is legally entitled to recover*. [As quoted in *Hamilton v. Farmers*, Id. at 216. Emphasis in the court's citation.]

State Farm Mut. Auto. Ins. Co. v. Bencomo, 873 P.2d 47, (Colo. Ct. App. 1994) held the exhaustion clause void as against the public policy of Colorado, even though the Colorado statutes also defined underinsured motorists coverage in terms of policy limits: "C.R.S. 10-4-609: "[UIM] . . .

coverage . . . shall cover the difference, if any, between the amount of the **limits of any legal liability coverage** and the amount of the damages sustained, ..."

Utah's statutory language never employs the phrase "limits of liability" in defining an underinsured motorist vehicle. Even its reference to "insufficient liability coverage" is found in a non-exclusive definition. Utah's statute says that an "underinsured motor vehicle **includes**" one with "insufficient liability coverage." 31A-22-305.3 (b)(i). The word "includes" leaves open the possibility that the court could find UIM coverage other than in the exact language of Section 31A-22-305.3(1)(b)(i). Therefore, the Utah legislature was careful not to pin down too exactly the definition of a vehicle entitled to underinsured motorist coverage, suggesting that the legislature desired to define UIM coverage broadly, subject to certain specific restrictions, but otherwise leaving open to the courts the option to do justice according to the beneficial purposes of the statute.

If, in the several Western states cited above, the use of the phrase "limits of liability" in the definitional sections of their UIM statutes did not preclude vitiation of the exhaustion clause, then certainly in Utah the mere

reference to policy limits in a tangential section of the UIM code relating to subrogation should not have that effect either.

2. The Statutory Provision for the Consumer to Opt Out of UIM Coverage Has no Effect on the Exhaustion Clause in the Western States

State Farm argues that Utah's statutory mandate that each insurance carrier offer all motorists UIM coverage is not a strong public policy because the consumer can opt out of the coverage. However, that argument once again fails to prevail under the majority view. Nevada (Nev. Rev. Stat. Ann. § 687B.145, Arizona (A.R.S. § 20-259.01) , Washington (Rev. Code Wash. (ARCW) § 48.22.030), Colorado (C.R.S. 10-4-609) and Montana (Mont. Code Anno., § 33-23-201 all allow the motorists to opt out of the mandatory offer of UIM coverage. Nevertheless, their courts find the UIM statutes to express a strong public policy, inconsistent with the exhaustion clause.

3. How does Utah's treatment of the UIM carrier's right of subrogation compare to other Western states?

Washington in *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 733 (Wash. 1987) adopted the rule of *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), superseded by statute as stated in *Onasch v. Auto-Owners Ins. Co.*, 444 N.W.2d 587 (Minn. Ct. App. 1989), that the UIM carrier could preserve a right of subrogation if it paid the liability claim before releasing

the tortfeasor. It held that any other application of the right of subrogation would undermine the purposes of the UIM statute. Thus, Washington, like Minnesota, has effected judicially what Utah has done statutorily: the protection of the UIM insured from having his UIM coverage denied under the pretext of the violation of subrogation rights. However, Minnesota granted the UIM carrier 30 days notice to decide whether to step into the shoes of the liability carrier in order to preserve its right of subrogation. *Schmidt v. Clothier*, 338 N.W.2d 256,263 (Minn. 1983). Utah law is not nearly as generous at five days. U.C.A. 31A-22-305.3(5)(a).

Nevada simply denies the underinsurer the right of subrogation. Nev. Rev. Stat. Ann. § 687B.145. Arizona's statue gives the UIM carrier a two year limitations period in which to bring an action for subrogation or reimbursement. It does not impose a five-day deadline to pay the liability claim or waive its right of subrogation. It is unclear how Arizona has solved the subrogation dilemma. Its protection of the insurer's right of subrogation is more extensive than Utah's and yet it still adopted the majority rule.

Montana seems to have no subrogation statute but relies on a case similar to Utah's *State Farm Mut. Auto. Ins. Co. v. Green*, 89 P.3d 97, 104,

DIXON TRUMAN FISHER
& CLIFFORD A Professional Corporation

St. George Office
20 North Main St., Suite 205
St. George, UT 84770
435.652.8000
Fax: 435.652.0770

March 10, 2011

Utah Supreme Court
450 South State Street
P.O. Box 140210
Salt Lake City, UT 84110-0210

RE: McArthur v. State Farm; Supreme Court Case No. 20100847-SC

Dear Clerk of Court:

Enclosed please find corrected page 35 to our Appellant's Brief mailed to you on February 28, 2011 regarding the above entitled matter. On the second line, at the top of the page where it says "See discussion above at pp. 4 and 6", a correction was to be made to the page numbers but they were inadvertently overlooked. Please attach this corrected page to our Brief. I have enclosed 10 copies of the page to be attached to all copies of our Brief for the Court's convenience.

If you have any questions, please contact me.

Sincerely,

DIXON, TRUMAN, FISHER & CLIFFORD, P.C.

Kathy Weeks, Legal Assistant

/ksw
Encls. (10 copies of page 35)
cc: Stuart H. Schultz
w/2 copies of page 35

s Vegas Office
1 N. Buffalo Dr, Suite A
, Vegas NV 89145

2003 UT 48 (Sup. Ct. 2003) to prevent injustice to the insured. See discussion above at pp. 15 and 27.

Utah's statute seems unique to the West, although Oregon currently has a somewhat similar provision. Subsection (D) of Oregon Revised Statutes 742.504(d) requires the insured to obtain consent to settle or to protect the insured's right of subrogation if the insured obtains a settlement less than policy limits.[9] Oregon had, under a previous applicable statute,

---

[9]ORS § 742.504 (d): This coverage does not apply with respect to underinsured motorist benefits unless:

(A) The limits of liability under any bodily injury liability insurance applicable at the time of the accident regarding the injured person have been exhausted by payment of judgments or settlements to the injured person or other injured persons;

(B) The described limits have been offered in settlement, the insurer has refused consent under paragraph (a) of this subsection and the insured protects the insurer's right of subrogation to the claim against the tortfeasor;

(C) The insured gives credit to the insurer for the unrealized portion of the described liability limits as if the full limits had been received if less than the described limits have been offered in settlement, and the insurer has consented under paragraph (a) of this subsection; or

(D) The insured gives credit to the insurer for the unrealized portion of the described liability limits as if the full limits had been received if less than the described limits have been offered in settlement and, if the insurer has refused consent under paragraph (a) of this subsection, the insured protects the insurer's right of subrogation to the claim against the tortfeasor.

2003 UT 48 (Sup. Ct. 2003) to prevent injustice to the insured. See discussion above at pp. 4 and 6.

Utah's statute seems unique to the West, although Oregon currently has a somewhat similar provision. Subsection (D) of Oregon Revised Statutes 742.504(d) requires the insured to obtain consent to settle or to protect the insured's right of subrogation if the insured obtains a settlement less than policy limits.[9] Oregon had, under a previous applicable statute,

---

[9]ORS § 742.504 (d): This coverage does not apply with respect to underinsured motorist benefits unless:

(A) The limits of liability under any bodily injury liability insurance applicable at the time of the accident regarding the injured person have been exhausted by payment of judgments or settlements to the injured person or other injured persons;

(B) The described limits have been offered in settlement, the insurer has refused consent under paragraph (a) of this subsection and the insured protects the insurer's right of subrogation to the claim against the tortfeasor;

(C) The insured gives credit to the insurer for the unrealized portion of the described liability limits as if the full limits had been received if less than the described limits have been offered in settlement, and the insurer has consented under paragraph (a) of this subsection; or

(D) The insured gives credit to the insurer for the unrealized portion of the described liability limits as if the full limits had been received if less than the described limits have been offered in settlement and, if the insurer has refused consent under paragraph (a) of this subsection, the insured protects the insurer's right of subrogation to the claim against the tortfeasor.

adopted the majority view regarding the exhaustion clause. *Vega v. Farmers Ins. Co. of Oregon*, 323 Or. 291, 918 P.2d 95 (1996).

The one case in the country whose statute mentions "liability limits" in the subrogation context rejects the exhaustion clause as against public policy.

Florida has a similar statutory solution to the subrogation dilemma in which policy limits are mentioned but it, nevertheless, holds with the majority rule in striking down the exhaustion clause. *New Hampshire Ins. Co. v. Knight*, 506 So. 2d 75 (Fla. 1987) quotes the statute:

> Section 627.727(6), Florida Statutes provides:
>
> (6) If an injured person or, in the case of death, the personal representative **agrees to settle a claim with a liability insurer and its insured for the limits of liability**, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer, then such settlement agreement shall be submitted in writing to the underinsured motorist insurer, which shall have a period of 30 days from receipt thereof in which to agree to arbitrate the underinsured motorist claim and approve the settlement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release. If the underinsured motorist insurer does not agree within 30 days to arbitrate the underinsured motorist claim and approve the proposed settlement agreement, waive its subrogation rights against the liability insurer and its insured, and authorize the execution of a full release, the injured person or, in the

---

ORS § 742.504

> case of death, the personal representative may file suit joining the liability insurer's insured and the underinsured motorist insurer to resolve their respective liabilities for any damages to be awarded; however, in such action, the **liability insurer's coverage must first be exhausted** before any award may be entered against the underinsured motorist insurer, and any such award against the underinsured motorist insurer shall be excess and subject to the provisions of subsection (1). Any award in such action against the liability insurer's insured is binding and conclusive as to the injured person and underinsured motorist insurer's liability for damages up to its coverage limits. [Emphasis added]

Then the court rejected the argument that this language compelled acceptance of the exhaustion clause:

> New Hampshire argues that this section explicitly requires that the tort-feasor's policy limits be first exhausted before a claim can be made for underinsured coverage. This contention has been squarely rejected by other courts which have considered it. In A*bberton v. Colonial Penn Insurance Company*, 421 So.2d 6 (Fla. 2d DCA 1982), *cert. denied*, 430 So.2d 450 (Fla. 1983) the court said:
>
> "The enactment of this section had no effect on section 627.727(1) which still provides that the coverage is over and above but shall not duplicate the benefits *available* to an insured." [Emphasis in original].

The Florida courts confronted with a statutory provision similar to that of Utah and an argument that such statute validates the exhaustion clause expressly rejected the argument, striking down the exhaustion clause, reasoning that their statutes should be construed to do justice and not to enshrine the exhaustion clause by some technical reference to policy limits, a reference found only in the context of subrogation rights. Clearly, the

Florida courts construe the legislative language in the subrogation scheme to be merely representative of the typical situation and not an endorsement of the exhaustion clause. This seems to be the only case directly on this point.

Notwithstanding the variety of treatments of subrogation, one thing remains clear. The statutory and case law treatment of subrogation arise out of the need to protect the UIM insured from the ploy of using subrogation to deny benefits. It would be against public policy for a statute designed to protect the consumer to be used to deny him or her benefits on a technical basis.

State Farm has not born its burden to show that the public policy interests expressed in the majority rule are any different in Utah. Rather, Mr. McArthur has shown that the same public policy interests expressed as justification for the majority's vitiation of the exhaustion clause appear prominently in Utah's case and statutory law: avoidance of litigation, promotion of settlement and the mandatory and beneficial nature of UIM coverage. Utah's statutory scheme falls in line with the statutes of the cases that adopted the majority view.

F. STATE FARM HAS NO ECONOMIC INTEREST IN THE EXHAUSTION CLAUSE BECAUSE THE UIM CARRIER IS GIVEN CREDIT FOR THE ENTIRE AMOUNT OF THE LIABILITY POLICY LIMITS EVEN IF THE PLAINTIFF HAS NOT OBTAINED THOSE LIMITS

The many jurists who have rejected the exhaustion clause have held that the UIM carrier is given credit for the full policy limits. (See for example the Nevada and Montana cases cited above.) The majority rule sometimes calls this "constructive exhaustion." *Horace Mann Ins. Co. v. Adkins, 215 W. Va. 297, 306 (W. Va. 2004*).

In explanation of the credit consider this hypothetical. Assume that Mr. McArthur's total personal injury recovery at trial is $180,000. State Farm would only have to pay $80,000 because it would get a credit for the full $100,000 although Mr. McArthur only received $90,000 from the liability carrier. Mr. McArthur would have received the $90,000 from the liability carrier and $80,000 from his own UIM carrier for a total of $170,000, yielding a sacrifice of the $10,000 in liability limits that he relinquished to obtain a quick settlement. This arrangement satisfies entirely the legitimate interest of the UIM carrier and fulfills the intent of the language of the exhaustion clause. The UIM carrier never loses any money if there is a credit granted. Moreover, the insured has every incentive to maximize his recovery against the liability policy.

G. UTAH PUBLIC POLICY DEMANDS VITIATION OF THE EXHAUSTION CLAUSE.

Utah law favors UIM insurance, considering it so important that it requires an insurance company to give UIM coverage to every person in the state of Utah who drives a motor vehicle. See UCA 31A-22-305.3(2)(b). Subsection (2)(d) provides for minimum limits of UIM coverage. The statute also provides that an insured may only avoid UIM coverage by an express written form that "includes a reasonable explanation of the purpose of the underinsured motorist coverage and when it would be applicable." UCA 31A-22-305.3(2)(g).

Moreover, Utah's strong public policy to encourage settlement and discourage litigation supports vitiation of the exhaustion clause. *Iron Head Constr., Inc. v. Gurney*, 2009 UT 25, P13 (Utah 2009) referred to "Utah's clear public policy of encouraging settlements." This public policy has remained firm for many years. In 1898 *Sandberg v. Victor Gold & Silver Mining Co.*, 18 Utah 66, 73 (Utah 1898) observed: "It is always desirable, and in harmony with public policy, that parties to a controversy should be permitted to make a bona fide settlement of their difficulties, and courts are not inclined to favor a lien which may be used as an instrument to embarrass or prevent such settlement." *Parents against Drunk Drivers v. Graystone*

Pines Homeowners' Ass'n, 789 P.2d 52, 55 (Utah Ct. App. 1990) stated: "In an early case, the Utah Supreme Court held a contractual provision granting an attorney control over the settlement of a lawsuit void as against public policy. *Potter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999, 1003 (1900). The court found such settlement control provisions run afoul of the policy to encourage settlements of causes and differences between persons. 61 P. at 1003."

H. STATE FARM MUT. AUTO. INS. CO. V. GREEN, 2003 UT 48, 89 P.3D 97, 104 (SUP. CT. 2003)'S HOLDING SUGGESTS AN ALTERNATIVE THEORY OF DECISION.

State Farm Mut. Auto. Ins. Co. v. Green, 2003 UT 48, 89 P.3d 97, 104 (Sup. Ct. 2003) held that UIM benefits should not be avoided where the UIM carrier suffers no real prejudice. As shown above, especially as shown by the path that Montana took, this holding is consistent with the majority rule that rejects the exhaustion clause as against public policy. However, another view of its holding suggests that, rather than a rule that vitiates all exhaustion clauses, a *Green* type analysis may be applied on a case-by-case basis. In *Green*, dealing with the consent-to-settle clause, the UIM carrier must prove that it suffered prejudice by the claimant's failure to obtain consent-to-settle. If the UIM carrier can prove prejudice, then the UIM coverage is avoided,

although that proof would be extremely difficult to marshal. So in the exhaustion clause case the UIM carrier might be required to prove that it has been prejudiced by the settlement of the liability case for less than policy limits. The same principles of Green would apply. This would be a variant from the majority rule.

IX. CONCLUSION

Nothing in Utah's statutory scheme militates against adoption of the majority rule that holds the exhaustion clause void as against public policy. Rather, Utah's statutory scheme is more conducive to the reasoning of the majority rule than the statutes of the other Western states that have so ruled.

Moreover, this Honorable Court's precedent in State *Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, 89 P.3d 97, 104 (Sup. Ct. 2003) clearly indicates that Utah should adopt the majority rule because said case followed the majority in preventing UIM carriers from precluding UIM claims on the basis of the consent-to-settle clause.

This Honorable Court should so certify to the Tenth Circuit, that Utah law holds that the exhaustion clause is void or, in the alternative, if generally

enforceable the UIM carrier must nevertheless prove that it is actually prejudiced by the failure of the insured to obtain policy limits.

Dated this 28 day of February, 2011

Dixon, Truman, Fisher & Clifford, P.C.

/s/ A. Bryce Dixon
A. Bryce Dixon

CERTIFICATE OF SERVICE

I do hereby certify that on February 28, 2011, I mailed a true and correct copy of Brief of Appellant in the US Mail at St. George, Utah, with first class postage prepaid and addressed as follows:

Stuart H. Schultz
Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, UT 84180

Dixon, Truman, Fisher & Clifford, P.C.

/s/ A. Bryce Dixon
A. Bryce Dixon